

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: **5 September 2024**

Organisation: **NNB Generation Company (HPC) Ltd**
Address: **90 Whitfield Street**
London
W1T 4EZ

Decision (including any steps ordered)

1. The complainant has requested information about acoustic fish deterrents. NNB Generation Company (HPC) Ltd (NNB GenCo) refused to comply with the request as it did not consider the information to be environmental or that it was subject to the EIR.
2. The Commissioner's decision is that NNB GenCo is a public authority for the purposes of the EIR and therefore was under an obligation to respond to the request. As it failed to provide any environmental information, the Commissioner finds that NNB GenCo breached regulation 5(2) of the EIR.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Issue a response, to the request, in accordance with its obligations under the EIR.
4. The public authority must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 12 March 2024, the complainant wrote to NNB GenCo and requested information in the following terms:

"We would be grateful if you could provide us with the following information:

1. The date on which final designs for the cooling water intake for Hinkley C nuclear power station were signed off;
2. Please provide a copy of the final construction design and any other designs for the cooling water intake and Acoustic Fish Deterrent (ADF) held by you;
3. The date on which the construction of the cooling water intake was completed;
4. Confirmation of whether a power supply for the ADF on the cooling water intake was included in the final intake as constructed;
5. The date on which the cooling water intake was installed;
6. Please also provide all correspondence between EDF (and its subsidiary), the Environment Agency and Natural Resources Wales in relating the selection of the named weirs in EDF's public consultation which closed on 29 February 2024.
7. Please provide any information regarding the anticipated cost of maintenance of the proposed AFD system at this location?
8. Please forward a copy of the initial 'long list' of compensatory measures sent to Natural Resources Wales, as referred to on page 6 of its 31-page consultation response of 29 February 2024."

6. NNB GenCo responded to the request on 9 April 2024. It stated that it "[did] not consider that the EIR is applicable to your request." Following an internal review NNB GenCo stated that it did not consider itself a public authority for the purposes of the EIR.

Reasons for decision

Would the requested information be environmental?

7. The request seeks information about the construction and operation of a water cooling intake. Nuclear reactors require large amounts of water for cooling and this is often drawn from natural water sources. NNB GenCo has been granted permission to construct a intake that will draw water from the Bristol Channel.
8. The information is therefore information on a measure likely to affect the elements of the environment (water and marine areas).

What is a public authority?

9. For the purposes of the EIR, an organisation will be a public authority if it is, or is under the control of:
 - a government department; or
 - any other body designated as a public authority by FOIA; or
 - a body that carries out functions of public administration.
10. NNB GenCo is clearly not a government department. It has not been designated as a public authority by or under FOIA. The company represents a joint venture between EDF Energy and China General Nuclear Power Group. In the absence of evidence to the contrary, the Commissioner is satisfied that NNB GenCo is not under the control of another public authority.
11. That leaves the question of whether NNB GenCo carries out functions of public administration. There are two tests to satisfy:
 - Has NNB GenCo been entrusted in law with functions relating to the environment? And, if it has;
 - Does NNB GenCo have special powers to carry out those functions?

Entrustment

12. In order to be classified as a public authority, an organisation must have been entrusted in law with functions relating to the environment. In practical terms, this usually means that the state must have passed a law, requiring the organisation to carry out certain functions it would more usually carry out itself.

13. NNB GenCo has a licence to generate electricity. It also holds a separate licence to install and operate two nuclear reactors. Finally there is secondary legislation designating it as the organisation responsible for organising construction of a power station and various other projects in the surrounding area.
14. NNB GenCo explained to the Commissioner that it did not consider the licensing regimes imposed by either the Gas Act 1986 or the Electricity Act 1989 to constitute entrustment. It argued that the market for supplying electricity and gas was a competitive one – unlike the one water and sewerage companies, which are public authorities, operate in – and therefore simply another competitive market with no special connection to the state. State regulation did not amount to the state tasking others with its functions.
15. In support of its stance, NNB GenCo pointed to [Heathrow Airport Ltd v Information Commissioner \(EA/2020/0101\)](#) in which the First Tier Tribunal found that Heathrow Airport Ltd (which operates Heathrow Airport) was not a public authority. The Tribunal argued that the mere fact that Heathrow (and airports in general) had once been operated by the UK government did not, in itself mean that the operating an airport was a power of the state.
16. The UK Government's involvement in the electricity market has been ongoing for over 100 years. Electricity was originally supplied by a collection of private companies and local authority-owned companies. Parliament passed the Electricity (Supply) Acts of 1919 and 1926 in an attempt to better-coordinate the national supply of electricity. Central coordination was enhanced during the war years by the Ministry of Fuel and Power.
17. In 1947 the Attlee Government passed the Electricity Act and took control of the supply of electricity itself. It established a new body (the British Electricity Authority) to be responsible for all electricity generation and 14 area electricity boards that would be responsible for supplying this electricity to consumers. In 1958, the British Electricity Authority was re-replaced with the Central Electricity Generating Board.
18. The 1989 Electricity Act abolished the Central Electricity Generating Board and broke it up into four companies. It also set up a system of licencing by which a company must apply for permission from the Government to generate electricity above a minimum level and must comply with the terms of any licence it is granted.
19. In respect of nuclear power, that was originally the responsibility of the UK Atomic Energy Authority – which was formed out of the Ministry of Supply. Responsibility then passed to British Nuclear Fuels Ltd, a

publicly-owned company. However, some of the UK's reactors are now privately-owned.

20. In the Commissioner's view, the supply of energy is something that states have, at least since the second world war, done themselves – or at least retained tight control over. Indeed the name EDF (one of NNB GenCo's parent companies) is derived from Électricité de France – the name of an electricity company wholly-owned by the French Government.
21. Furthermore, the Commissioner notes that the recently-elected Labour Government in the UK has plans to create a new state-owned energy company. This indicates that the supply of energy is field in which the British state maintains a strong interest. The use of nuclear technology is an area where the state is particularly interventionist when it comes to the standards that must be met. As well as a licence to generate electricity, a company must also acquire a licence from the Office of Nuclear Regulation in order to operate a nuclear power plant.
22. The Commissioner does not consider the Heathrow Airport case supports NNB GenCo's case for two reasons. Firstly, judgements of the first tier tribunal are not binding on the Commissioner. Secondly, and in any case, although the Tribunal found that Heathrow Airport Ltd had not been entrusted with functions of public administration, it noted the "obvious difference between the provision of water, sewerage, **gas, and electricity** and the provision of an airport; the former are essential to everyday life but the latter is not in the same category." [emphasis added]
23. Furthermore, a piece of secondary legislation (The [Hinkley Point C \(Nuclear Generating Station\) Order 2013](#)) grants NNB GenCo permission to develop the site as a piece of nationally significant infrastructure. That same piece of legislation also allows the company to act as a Harbour Authority during construction.
24. The Commissioner is satisfied that, by operating a system of licences, (as opposed to a market which any provider can enter at any time) and by passing a specific piece of authorising legislation, the Government is entrusting NNB GenCo with a function it might otherwise carry out itself and wishes to tightly control. The first test is therefore met.

Special Powers

25. As well as having been entrusted with functions in law, in order to be a public authority for the purpose of the EIR, an organisation must also have been granted special powers in order to carry out those functions.

26. In [Fish Legal and Shirley v Information Commissioner and Others C-279/12](#), the Court of Justice of the European Union ruled that a public authority must have been granted special powers “beyond those which result from the normal rules applicable in relations between persons governed by private law.”
27. Ordinary private citizens and companies are able to enter into contracts with each other on a voluntary basis and, where necessary, to enforce those contracts through legal action. For example, if Person A supplies goods or services to person B, but person B refuses to pay for them, person A can ask a court to enforce their rights. Ultimately that might result in the court ordering bailiffs to enter person B’s property and seize sufficient of their assets to enable their debt to be paid.
28. To qualify as “special powers” an organisation must have other powers beyond the right to ask a court to enforce a contract. For example an organisation might have the right to make and enforce byelaws on land that it owns; the power to compulsorily purchase land for its own use or the power to require access to private property.
29. The Upper Tribunal in [Fish Legal and Shirley v Information Commissioner and Others \[2015\] AACR 33](#) stated that the test for whether a power was a “special power” or not could be addressed by asking the question “Do the powers give the body an ability that confers on it **a practical advantage** relative to the rules of private law?”
30. In [Information Commissioner v Poplar HARCA \[2020\] UKUT 182 \(AAC\)](#), the Upper Tribunal agreed with a previous decision of the First Tier Tribunal that a provider of social housing had not been entrusted in law with any functions.
31. However the UT went on to say that, had it needed to do so, it would have disagreed with the FTT’s finding that Poplar HARCA had special powers. The provider had certain powers to evict its tenants that would not be available to private landlords. However the Upper Tribunal concluded that these powers arose as a result of the different types of tenancies offered by private landlords and social housing providers. Whereas a private landlord could secure an eviction via civil litigation, social housing providers did not have the same ability to do so. The Upper Tribunal therefore concluded that the powers available to Poplar HARCA **mitigated a disadvantage** it had relative to private landlords, rather than provided it with a “practical **advantage**.”
32. NNB GenCo accepted that, as part of the Hinkley Point C (Nuclear Generating Station) Order 2013, it had been granted powers to compulsorily purchase land. However it argued that these powers had

expired in 2018 and that, in any case any person could apply for a similar authorisation.

33. NNB GenCo also agreed that it had the power to make certain byelaws, but it argued that these were limited to its role as a harbour authority and that was only a temporary role whilst it operated a temporary jetty to support construction work.
34. Finally, NNB GenCo pointed to Schedule 4 of the Electricity Act 1989 which allows it to carry out street works. However it argued that this power did not amount to a special power because it could only be exercised with the consent of the relevant street authority.
35. Having considered the matter at length, the Commissioner considers that NNB GenCo does have special powers.
36. Ordinarily, a company wishing to place apparatus on or under a street or wishing to repair or replace apparatus already installed under a street must seek a licence from the street authority. It is an offence to carry out works without a licence.
37. Because of the Hinkley Point C (Nuclear Generating Station) Order 2013, NNB GenCo may, whilst it is still in the construction phase, carry out a wide variety of work on a number of streets without having to obtain a licence or the consent of the relevant street authority.
38. Even once the site is operational, NNB GenCo will still have an advantage over other companies by virtue of its generating licence. Whilst it will then require the consent of the street authority, the street authority cannot unreasonably withhold consent. Furthermore, if the street authority were to refuse consent, the Electricity Act requires the matter to be sent for arbitration – rather than pursued via a more costly court route.
39. Up until the end of 2025, NNB GenCo has been given permission to construct a jetty to allow raw materials for construction to be delivered via ship. Until that point it is also entitled to act as a harbour authority for that jetty and the immediate surrounding area. This means that the company can impose byelaws determining which vessels are allowed to operate in that area and under what conditions. It is also entitled to organise its own dredging activities within the area.
40. Although this authorisation is not indefinite, the legislation allows for it to remain in place until 31 December 2025 and, with the permission of the Secretary of State, beyond that date. The Commissioner notes that, at the point the Order was made, the site was due to begin generating electricity in 2023 – but the most recent estimate is that an optimistic target is 2029. Given the shift in construction timetable it seems unlikely

that the original period authorisation (which wasn't due to expire until two years after the start of generation) will be sufficient.

41. In summary, the Commissioner is satisfied that NNB GenCo has been entrusted with functions of public administration, in the granting of specific secondary legislation authorising it to construct a nationally significant infrastructure project, licences to construct and operate nuclear reactors and a licence to generate electricity. It has also been vested with special powers, beyond those available to ordinary private citizens, to enable it to carry out these functions.
42. The Commissioner is therefore satisfied that NNB GenCo is a public authority for the purposes of the EIR and was obliged to respond to the request in accordance with its obligations under the Regulations.

Right of appeal

43. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.

45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Roger Cawthorne
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